ployee to do so, although the employer might be liable vicariously for the employee's negligence or breach of statutory duty, would not be a breach of the condition. That was established in, and was the ratio decidendi of, *Woolfall & Rimmer, Ltd.* v. *Moyle and Another.* (ii) The obligation of the employer is to take precautions to prevent accidents. This means in my view to take measures to avert dangers which are likely to cause bodily injury to employees. (iii) The third word to be construed in this context is 'reasonable'. 'The insured shall take reasonable precautions to prevent accidents.' 'Reasonable' does not mean reasonable as between the employer and the employee. It means reasonable as between the insured and the insurer having regard to the commercial purpose of the contract, which is *inter alia* to indemnify the insured against liability for his (the insured's) personal negligence. That, too, is established by the case that I have cited. Obviously the condition cannot mean that the insured must take measures to avert dangers which he does not himself foresee, although the hypothetical reasonably careful employer would have foreseen them. That would be repugnant to the commercial purpose of the contract, for failure to foresee dangers is one of the commonest grounds of liability in negligence. What in my view is 'reasonable' as between the insured and the insurer, without being repugnant to the commercial object of the contract, is that the insured should not deliberately court a danger, the existence of which he recognised, by refraining from taking any measures to avert it. Equally the condition cannot mean that, where the insured recognises that there is a danger, the measures which he takes to avert it must be such as the hypothetical reasonable employer, exercising due care and observing all the relevant provisions of the Factories Act, 1961, would have taken. That, too, would be repugnant to the commercial purpose of the contract, for failure to take such measures is another ground of liability in negligence for breach of statutory duty.

What in my judgment is reasonable as between the insured and the insurer, without being repugnant to the commercial purpose of the contract, is that the insured, where he does recognise a danger, should not deliberately court it by taking measures which he himself knows are inadequate to avert it. In other words, it is not enough that the employer's omission to take any particular precautions to avoid accidents should be negligent; it must be at least reckless, i.e., made with actual recognition by the insured himself that a danger exists, not caring whether or not it is averted. The purpose of the condition is to ensure that the insured will not refrain from taking precautions which he knows ought to be taken because he is covered against loss by the policy."

In the circumstances of the present case, condition 3 is in our opinion repugnant to the commercial purpose of the contract. The second reason is therefore also not a valid reason for dismissing the defendants claim against the third party.

In our judgment, the defendants' appeal should be allowed with costs here and in the court below.

Appeal allowed.

Solicitors: *Tan Rajah & Cheah; Laycock & Ong.*

MALAYSIAN REPORTS

ENG GIAP PUBLIC MOTOR BUS CO. LTD. v. GAN ENG KENG & 36 ORS.

[F.C. (Gill C.J., Ong Hock Sim and Raja Azlan Shah F.JJ.) August 30, 1974]

[Kuala Lumpur — Federal Court Civil Appeal No. 119 of 1973]

Master and Servant — Bus drivers and conductors — Claim for overtime — Long hours of inactive employment — Employment Ordinance, 1955, ss. 60A and 70.

The respondents had been employed by the appellants as bus drivers and conductors. They had to work approximately twelve hours a day and their wages were originally inclusive of overtime work. The respondents claimed overtime wages for the average of 60 hours a month, to which they claimed they were entitled after the coming into force of section 60A(3) of the Employment Ordinance, 1955 on the October 9, 1969. The appellants had continued to pay the same wages to the respondents after the coming into force of that law. The Labour Officer who conducted the inquiry under section 70 of the Employment Ordinance, made an order that the appellants pay overtime wages for 4 hours a day. On appeal to the High Court, the High Court dismissed the appeal and confirmed the order of the Labour Officer but ordered that the amount of overtime for the first eight days of October 1969 be deducted, as the new law did not come into effect till October 9, 1969. The appellants appealed to the Federal Court.

Held: (1) as there was no dispute as to the number of hours for which the respondents worked and as there was no written contract of service, whatever overtime work the respondents did was clearly done at the request of the appellants and they were therefore entitled to overtime wages;

(2) in this case the learned judge should have considered the provisions of section 60A(8) of the Employment Ordinance, 1955. In the light of that provision, as each of the respondents had at least two hours of inactive or standby employment in relation to the 4 hours of overtime work, such rest periods must be treated as long hours of inactive employment;

(3) the respondents were therefore entitled to wages for two hours of overtime work per day.

Case referred to:-

(1) *Bonham-Carter* v. *Hyde Park Hotel* 64 T.L.R. 177, 178.

FEDERAL COURT.

Edgar Joseph Jr. (*V. C. George* with him) for the appellants.

D. Puthucheary for the respondents.

Gill C.J.: This is a further appeal to this court from the dismissal by the High Court of an appeal by the appellants against an order of a Labour Officer requiring them to pay to the Commissioner for Labour, Negri Sembilan a sum of $7,407.60 being wages for overtime work performed by the respondents as employees of the appellants.

The claim for the recovery of overtime wages was made in pursuance of section 60A(3) of the Employment Ordinance, 1955 which came into force on 9th October 1969. The proceedings commenced with the first respondent, Gan Eng Keng, presenting a written statement of complaint to the Labour Office, Seremban under section 70(a) of the said Ordinance. Encik Koh Ah Lek, a Labour Officer, examined the complainant on affirmation and recorded the substance of the complainant's statement as required by section 70(b) of the Ordinance. Having stated on affirmation that he had been appointed as the spokesman for the other com-

plainants in the case, the first respondent handed in a statement setting out the claim of each complainant for overtime work for the period 1st October 1969 to 31st October 1970 for a total sum of $21,677.59 cts.

The complainant went on to testify that all of them were either bus drivers or conductors, that they had not signed any written contract with the appellants, and that the number of hours for which they had to work each day in order to earn their daily wages was not specified. The daily rate of wages for bus drivers was $7.20 cts. and for bus conductors $6.20 cts. Each worker did between 1 hour 40 minutes to 2 hours 15 minutes overtime work for each day. On the average each of them had done 60 hours overtime work each month, and the appellants had not paid them overtime wages for the period 1st October 1969 to 31st October 1970. Their overtime pay for that period amounted to $21,677.59 cts. which they wished to claim through the Labour Department.

Having recorded the above statement on affirmation from the complainant, the Labour Officer made a note at the foot of the statement, as required by section 70(c), that he was satisfied that the claim needed inquiring into. In due course a summons was issued to the person complained against, namely the appellants, under section 70(d) and (e). An inquiry, as required by section 70(g) of the Ordinance, to examine on oath or affirmation the person summoned or otherwise present to give evidence material to the matters in issue was held on May 17, 1971 by a different Labour Officer, Encik T. Padmanathan. The statement of complaint was read over to the appellants who were represented by one David Wong Chin Duing, Chief Executive Officer, Malayan Employers Consultative Association, to repudiate the respondents' claim in toto. The complainant said that he had nothing further to add to his original statement, whereupon he was cross examined.

Under cross-examination the first respondent stated that he had been in the service of the appellants for 22 years. There was a verbal agreement on conditions of service when they commenced work with the appellant company. He was told that he would be paid a certain amount of wages but the hours of work were not specified. They agreed to work and did work for 12 hours a day for a certain amount. When the new law came into being in October 1969, after consulting the Labour Office at Seremban, they decided to make a claim for overtime work. As their union did not succeed in their demand for 8 hours work a day, they withdrew their demands and continued to work as usual for 12 hours with a pay rise of 20 cts. a day. His cross-examination concluded with a statement from him that he did not know the legal definition of working hours but he knew that they were required to work from 6.30 a.m. to 6.30 p.m.

In answer to questions put to him by the inquiring officer, the first respondent said that there was no difference in their take-home wages when the new law came into being, nor was there any change in the wage structure before and after the new law. As they did not notice any change in the structure of wages in the pay sheets, they simply signed and collected their wages.

One Kudran bin Yasin gave evidence at the inquiry that he had been working for the appellants as a driver for 15 years. He drove a bus between Tampin and Kuala Pilah, a distance of about 24 miles, making 4 trips a day. He commenced work at 6.30 a.m. and finished at 6.30 p.m. He had not been paid any overtime wages by the appellant company. Under cross-examination he said that he had not suffered any reduction in the wages after 10th October 1969, and he was aware of the new law under which for any work done after 8 hours overtime wages should be paid. Upon being shown the pay sheet for December 1970, he said that it was correct and that he signed it, although he did not know what was stated in column 5. In answer to the inquiry officer, he said that he did not sign blindly; he looked at the last column for wages and if they tallied with his calculation he signed and accepted the wages. He got $7.20 cts. a day for 12 hours work.

Encik Koon Fatt Tham alias Kon Fook Choon is the director and general manager of the appellant company. He gave evidence on behalf of the appellants, which may be summarised as follows. He first joined the company in 1962 when the approximate working hours of each worker were 12 hours which included meal breaks and rest periods. He had occasions to recruit new workers for the company. He took them on verbal contracts telling them that they had to work approximately 12 hours a day and that their wages were inclusive of overtime work. There was no change in the working conditions with the coming into force of the new law in October 1969.

He went on to say that he knew about the restructure of pay sheets after a meeting between the Pan Malayan Road Transport Operators Association and the Director-General of Labour. On receiving a letter from the former, he restructured the pay sheets to show the breakdown of the basic wages and the overtime wages. Under the new arrangement the take-home pay of each worker was not less than before, and he did not force any of his workers to sign the new pay sheets. They signed voluntarily. He had a total labour force of 79 out of which about 50 were bus drivers and conductors, and there were 13 bus drivers and conductors who had made no claim for overtime wages as they were satisfied that they were getting what they were entitled to under the law. The bus drivers and conductors did not work continuously for 12 hours a day. They made 6 to 10 journeys, depending on the routes, with 30 to 40 minutes break after each journey and finishing their work at 6.15 or 6.30 p.m. They took their meals in between the rest periods. The appointment letter given to each worker merely stated the occupation and daily wages without specifying the working hours.

Having reserved judgment after hearing all the evidence at the inquiry before him, Encik Padmanathan gave his decision on 26th May 1971 when he made an order that the appellants do pay to the Commissioner for Labour, Negeri Sembilan on behalf of the complainants a sum of $7,407.60 being wages due to them for overtime work.

In making his award on the evidence before him, the Labour Officer found as a fact that the complain-

ants had worked for many years on agreed wage rates inclusive of overtime work for specified times. He also found that, in order to circumvent the new law as regards payment for overtime work, the appellants restructured the complainants' paysheets on the advice of the Pan Malayan Road Transport Operators Association to show a split in the wages between basic pay for 8 hours of normal work and wages for overtime work in a way which would not result in the reduction of the daily take-home pay of their employees. This he found to be in contravention of section 60A(3) of the Employment Ordinance which requires extra work to be paid for at a rate of not less than one and half times the hourly rate of pay irrespective of the basis on which such rate was fixed.

He has stated in his grounds of judgment that with the coming into force of the new law the appellants should have raised overtime rates from single to one and half times instead of restructuring the original wages into basic wages plus overtime wages. As regards the complainants' claim for overtime for 2 hours per day, he took the view that they had done so because they thought that meal breaks and rest periods did not fall within the meaning of working hours. In this connection he referred to the appellants' letter dated 27th October, 1970 in which they had confirmed the correctness of the complainants' claim. As to the limit of 32 hours per month imposed in respect of overtime work under section 60A(4) of the Employment Ordinance, he pointed out that the Minister for Labour had exempted the appellant company from that provision with effect from 1st January 1970.

Against the order of the Labour Officer the appellants appealed to the High Court on the grounds that he was wrong in holding against the weight of evidence that the complainants in fact worked 12 hours a day, that he misconstrued the law and/or misinterpreted the definition of "hours of work" in section 60A(9) of the Employment Ordinance, that he erred in law and in fact in holding that the rest periods and meal hours were hours of work within the meaning of the law, that he prejudiced his mind against the weight of evidence by making a finding that the complainants' paysheets were restructured merely to circumvent the law, and that he did not have jurisdiction to allow 4 hours in respect of overtime work when the claim was for only 2 hours.

At the hearing of the appeal before the High Court, the ground that the Labour Officer had no jurisdiction to award overtime wages for 4 hours when the claim was only for 2 hours was abandoned. The ground as regards the finding of the Labour Officer that the restructure of paysheets was a device to circumvent the new law was not seriously pursued. In any event, that was a finding of fact which could not be seriously challenged. The other grounds of appeal were rejected because it was common ground between the parties that the agreed hours of work of the respondents at all material times were 6.30 a.m. to 6.30 p.m. inclusive of meal breaks and rest periods, and that as regards such meal breaks and rest periods they had to be taken into account in computing the hours of overtime work by reason of the provisions of section 59(5) of the Ordinance because during such time the respondents were at the disposal of their employers and were not free to dispose of their own time.

It is to be observed that as regards the question of "hours of work" section 60A(9) was not in force at the relevant time, as it came into force only on 1st October 1971. In the result, the learned appellate judge dismissed the appeal but ordered that the amount of overtime pay claimed for the first 8 days of October 1969 should be deducted from the total award to each of the respondents, since the new law [P.U.(A) 409/69] did not come into effect until 9th October 1969.

The appeal to this court is founded on six separate grounds. The first ground, which is to the effect that the Labour Officer who made the award appealed against had no jurisdiction to hear the inquiry since the preliminary examination of the complainants' spokesman was conducted by another Labour Officer, has been abandoned, the reason given for such abandonment being that there is nothing in section 70 of the Ordinance to say that another officer may not hold the inquiry. The real reason, however, is that section 89 of the Ordinance provides for any other officer to proceed with the inquiry from the stage at which the previous officer left it.

The fourth ground of appeal is also procedural. This ground reads that the learned judge failed to appreciate that the mere reading over to the respondents' representative of the complainants' statement, which was not tendered as an exhibit, was no adequate substitute for the giving of oral evidence in the manner prescribed by law. It is said that the makers of the statement were not called as witnesses and that there was no examination-in-chief of the first respondent, with the result that the case was decided on the evidence of the first respondent under cross-examination, the evidence of Kudran and that of the Director and General Manager of the appellant company.

I do not think there is any merit in this ground. As I have stated earlier, the provisions of section 70 were strictly complied with in holding the inquiry. The first respondent had a common cause for complaint against the appellants. It was therefore not necessary for each of the other respondents to make a separate complaint as is expressly laid down in section 72 of the Ordinance. The statement of claim does form part of the record, and the first respondent gave evidence, after he had been duly affirmed, as to that claim. There was in fact no dispute on the facts and the appellants had by their letter dated 27th October 1970 admitted the claim. The evidence given by the first respondent was not hearsay, as alleged by counsel for the appellants. It is to be observed that we are dealing not with a criminal case but an inquiry into a civil claim.

The second ground of appeal is that the learned judge failed to appreciate that there was no evidence or no sufficient evidence on which he could make a finding as to the number of hours for which each of the respondents had worked during the relevant period. It is said in this connection that, in order to establish their claims, each of the respondents had to prove that he worked for and at the request of the appellants for more than 8 hours per day and to shew the number of days on which and for how many hours the over-

time work was done. The case of *Bonham-Carter* v. *Hyde Park Hotel*[1] was cited for the proposition that the respondents had to prove their claims strictly if they wished the court to award them damages. It was further argued that the respondents had to prove that overtime work was done at the request of the appellants and not under a contract of service.

A short answer to this ground of appeal is that there was no dispute as to the number of hours for which the respondents worked. It was common ground between the parties that there was no written contract of service as such. Whatever overtime work the respondents did was clearly done at the request of the appellants. Assuming that they did work under a contract of service, section 7 of the Ordinance provides that no condition of any contract of service shall be contrary to the provisions of the Ordinance and that any such condition which is contrary to such provisions shall be void and of no effect. That nullifies the argument that overtime work was done under and by virtue of the contract of service and not at the request of the employers. As regards their claims, they were not for damages but for wages for overtime work as are permitted under the Ordinance.

The other grounds of appeal boil down to the proposition that the learned judge was wrong in holding that the fact that the 12 hours included meal breaks and rest periods should not make any difference in the computation of hours of overtime work because of section 59(5) of the Ordinance and that even on the facts found by him the amount of overtime wages awarded was excessive. It is to be observed that the respondents themselves claimed overtime wages for a maximum of 2 hours 15 minutes a day after making an allowance for their rest and meal periods. The appellants, on the other hand, claimed that the respondents had more than 3 hours for their rest and meal periods. It is further to be observed that section 59(5) of the Employment Ordinance had been repealed, a fact which was overlooked by the learned judge when he decided the appeal on the basis of that section.

What the learned judge had to consider was the provision contained in section 60A(8) of the Ordinance which reads:

"The provisions of this section shall not apply to labourers engaged in work which by its nature involves long hours of inactive or stand-by employment."

The only point to be decided in this appeal therefore is whether the rest and meal periods of the respondents were "long hours of inactive or stand-by employment." Taken by themselves and in isolation, these rest periods may not be considered long hours of inactive or standby employment, but their sum total must be considered in relation to the period of 4 hours for which the respondents remained at work in excess of 8 hours. If it is agreed that each of them had at least 2 hours of inactive or standby employment in relation to the 4 hours of overtime work, then such rest periods must be treated as long hours of inactive employment. It was pointed out by counsel for the respondents that the appellants had in fact admitted the claim for 4 hours, but that admission was clearly made under a misapprehension of law, so that they should not be held to be bound by it.

In the result I would hold that the respondents were entitled to wages for 2 hours of overtime work per day. I would therefore allow the appeal to the extent that their claims be reduced to half the amounts as held to be due to them by the learned appellate judge. In all the circumstances of the case I will make no order as to costs.

Ong Hock Sim and **Raja Azlan Shah F.JJ.** concurred.

Order accordingly.

Solicitors: *Joseph & Son; Skrine & Co.*

U.N. FINANCE BHD. v. DIRECTOR-GENERAL OF INLAND REVENUE

[A.C.J. (Abdul Hamid J.) November 11, 1974]
[Kuala Lumpur — Originating Motion No. 3 of 1974]

Income Tax — Company buying and selling shares — Whether company carrying on business of dealing in shares or making investments in shares — Question of fact determined by Special Commissioners — Whether court can interfere — Losses incurred by the company through their branch in Singapore — Whether deductible — Double Taxation Relief (Republic of Singapore) Order 1966, art. IV(1)(a) — Income Tax Act, 1967, ss. 4(a) and 40.

In this case the appellants were a company whose objects *inter alia* were the accumulation of capital by means of monthly subscriptions or otherwise and also by borrowing money from members, depositors and others. They also had powers to acquire movable and immovable property by way of investment with a view to resale. The appellants bought and sold shares in a number of companies and in respect of the sale of some shares made a profit on which they were assessed to tax. They contended that the purchasing of shares was made as a long term investment and the profits made were capital in nature being realization of capital investments. The appellants incurred losses through their branch in Singapore and sought to have these losses taken into account in arriving at their chargeable income. The Special Commissioners held that the profits realized by the appellants for the sale of their shares was assessable to tax and they also held that the appellants were entitled to deduct their trading losses in Singapore from their income derived in Malaysia. The appellants appealed and the Director-General of Inland Revenue counter-appealed.

Held: (1) the Special Commissioners in this case were justified on the facts in arriving at a decision that the appellants were carrying on a business of dealing in shares as an adventure or concern in the nature of trade and therefore the profits from the sale of the shares in question were assessable to tax;

(2) the Special Commissioners had erred in law in arriving at the decision that the losses of the Singapore branch attributable to business carried out in Singapore should be deducted from their income derived in Malaysia in the ascertainment of the appellant's total income for the year of assessment 1968.

Cases referred to:-

(1) *J.P. Harrison (Watford) Ltd.* v. *Griffiths (H.M. Inspector of Taxes)* 40 T.C. 281 at p. 296 and 303.

(2) *Edwards* v. *Bairstow* [1966] A.C. 14, 36 T.C. 202 at p. 224 and 225.

(3) *Punjab Co-op Bank Ltd.* v. *C.I.T.* [1940] A.C. 1055 at p. 1072.

(4) *General Reinsurance Co. Ltd.* v. *Tomlinson (Inspector of Taxes)* [1970] 1 W.L.R. 566 at p. 569.

(5) *Case A 35* (1969) 69 ATC 201.

(6) *National Bank of Australasia Ltd.* v. *Federal Commissioners of Taxation* (1969) 69 ATC 4042.

(7) *Commissioners of Inland Revenue* v. *British Salemson Aero Engines Ltd.* 22 T.C. 29 at p. 43.